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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No.

SAMUEL RENNY DAMON, HERMAN VON HOLT, DAVID HEBDEN PORTEUS, and JOHN EDWARD RUSSELL, Trustees under the will of SAMUEL M. DAMON, Deceased; LILLIAN TOM LOO, BEATRICE L. LUKE; KAN JUNG LUKE; FERMIN ABUCE; H. K. AHUNA; B. S. AKANA, et al.,

Petitioners,

vs.

TERRITORY OF HAWAII by HERBERT Y. C. CHOY, its Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Hawaii

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

While we do not believe that any questions are presented in the state of the record herein, the petitioners have predicated certain points upon which the petition is based, and the respondent must necessarily adapt itself to answer them. Briefly stated, as they appear to the respondent's analysis, these points are:

1. Does the Fifth Amendment of the Constitution of the United States prevent the Territory of Hawaii (State), pursuant to an order of the Territorial trial court allowing amendments to a condemnation complaint, from condemning the fee simple absolute estate of lessors and their reversionary rights, exclusive of lessees' interests and buildings which lessees own and or have a right to remove under the terms of their lease?

2. Does the Fifth Amendment prevent the Territory of Hawaii (State) from wholly or partially abandoning a condemnation proceeding prior to final judgment?

STATUTORY PROVISIONS INVOLVED

Chapter 8, Revised Laws of Hawaii 1955, as amended, section 8-5: "Fee simple or lesser estate may be acquired. In the taking of private property for a public use, a fee simple estate or any lesser estate may be acquired."

STATEMENT OF THE CASE

In addition to the statements presented by petitioners, the respondents submit that at the time of the filing of the original condemnation complaint the original term of lease of petitioners had expired and they were under a quarterly tenancy (3 months' term) subject to termination upon the giving of thirty (30) days' written notice prior to the expiration of any extended quarterly term. (App. II to Petition, p. 33). Never during the entire proceedings in condemnation was the Territory of Hawaii (State) ever in physical possession of any of the petitioners' premises nor were any of the petitioners ousted from possession.

ARGUMENT

I

THE RECORD IN THIS CASE DOES NOT PRESENT ANY QUESTION OF TAKING OF PRIVATE PROPERTY WITHOUT PAYING JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The protection accorded under the Fifth Amendment of the Constitution of the United States is that private property shall not be taken for public use without just compensation. Where there is no taking, compensation need not be made. Re *Akana, Application for Writ of Mandamus* (App. II to Petition, p. 42); *Emerson v. City of Somerville*, 166 Mass. 115, 44 N.E. 110. And the question is what has the owner lost, not what has the taker gained. *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195.

II

THE SOVEREIGN, PURSUANT TO STATUTE, MAY CONDEMN A FEE SIMPLE INTEREST IN LAND SUBJECT TO AN EXISTING LEASEHOLD OR HOLDOVER TENANCY, INCLUDING THE LESSEE'S OR TENANT'S RIGHT TO REMOVE BUILDINGS AND IMPROVEMENTS THEREON UPON TERMINATION OF LEASE.

The courts of the various jurisdictions have consistently held that a fee simple estate may be condemned subject to any lesser interest therein. *New York Telephone Co. v. United States,* 136 F. 2d 87 (2d Cir.), a taking of the fee subject to existing public utility easements; and *United States v. Tavares Construction Co.,* 175 F.2d 379 (9th Cir.), a taking of the fee subject to a lease. The petitioners have been persistent in citing various cases as authorities holding that lessees of land under condemnation have a right to compensation for buildings and improvements thereon as an interest in the fee but have neglected to distinguish these cases cited as involving cases where the condemner seeks to condemn the entire fee simple interest including improvements thereon without reservation or only a leasehold interest including the buildings. Typical of these cases cited are *United States v. General Motors Corp.,* 323 U.S. 373, 384, 89 L. Ed. 310 (Pet. p. 5); *United States v. Seagren,* 60 App. D.C. 183, 50 F.2d 333; *Jackson v. State,* 213 N.Y. 34, 106 N.E. 758; *Duckett & Co. v. United States,* 266 U.S. 149, 69 L.Ed. 216; *Burkhart v. United States,* 227 F.2d 659 (9th Cir.).

The *General Motors* case is not apt as authority for the petitioners' contention on the ground that it

involved a condemnation of a leasehold interest, unlike the case at bar where the leaseholders were excluded from the taking. The issue on appeal in that case was whether market value of the temporary interest condemned should be confined to a vacant building or a building fully equipped. Also there, it involved a question of the tenant's right to be compensated for damages to fixtures and equipment, and the removal and storage of same since it was an unusual case. It is the contention of the respondent that the *General Motors* case sustains the position of the respondent in that compensation need only be paid for what is taken. The court said:

> "In the light of these principles it has been held that the compensation to be paid is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good position pecuniarily as if his property had not been taken." (323 U.S. 379).

So also, *United States v. Seagren,* supra, may be distinguished from the instant case because in that case the condemner condemned the fee simple interest together with the leasehold and the right of the lessee to remove the buildings thereon; whereas in the case at bar the leasehold of the petitioners and the respective rights to remove the buildings under the terms of the lease have been expressly excluded from the taking pursuant to the amendment to the Amended Complaint allowed by the trial court. And so is *Burkhart v. United States,* supra, distinguished from the case at bar.

Jackson v. State, supra, involved an unqualified taking, whereas in the instant case the taking is subject to the interest of the leasehold. The court said in the *Jackson* case:

> "An appropriation of land, *unless qualified when made,* is an appropriation of all that is annexed to the land whether classified as buildings or as fixtures. . . ." (106 N.E. 758) (Emphasis ours)

The above quoted excerpt implies that under a qualified taking the lessor's interest subject to outstanding leasehold may be taken. The issue in the *Jackson* case was whether or not certain fixtures were part of the buildings and hence compensable under our Constitution. There the condemner sought to condemn the land, the leasehold interest and the buildings, however sought to avoid payment for certain fixtures.

Duckett & Co. v. United States involved condemnation for a temporary use of a certain bus terminal and pier facility. This court sustained the claim of the lessee of the owner for compensation for the unexpired term of its lease because the leasehold was taken.

Section 8-5, Revised Laws of Hawaii 1955, permits the condemnation of a fee simple estate subject to an existing tenancy. The statute was so construed in the case at bar. Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 425 (App. II to Petition, p. 41).

Courts have consistently held that a condemnation proceeding is analogous to a forced sale.

> "'Condemnation' is an enforced sale, and the state stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined." (*Jackson* case, supra, 106 N.E. 758)

And this theory of condemnation is supported by the Supreme Court of Hawaii in the instant case: Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 436, 437 (App. II to Petition, pp. 52, 53).

III

THE SOVEREIGN, PURSUANT TO STATUTE, MAY WHOLLY OR PARTIALLY ABANDON A CONDEMNATION PROCEEDING.

The respondent may exclude the petitioners' leasehold interests and the buildings they own and have the right to remove, after it once included them in the scope of the taking. This is implicit in the statutes of the State under section 8-25, Revised Laws of Hawaii 1955, which allows damages upon abandonment of proceedings "before reaching final judgment." The statute was so construed in the case at bar. Re *Akana, Application for Writ of Mandamus,* 42 Haw. 415, 426, 427 (App. II to Petition, pp. 42, 43; App. I to Petition, note 2, p. 9).

Because of the exclusion of the leasehold interests of petitioners by the order amending the amended complaint on February 19, 1958 (App. I to Petition, note 9), petitioners were not entitled to notice of the discontinuance of the proceedings filed against the

fee simple owners and the order entered pursuant thereto. (App. I to Petition, note 2, p. 8.)

CONCLUSION

In summary, we submit that petitioners have entirely failed to show any taking of their leasehold interests in the condemnation proceeding and no property of the petitioner having been condemned the petitioners are not entitled to any compensation except for damages, if any, for abandonment of the condemnation proceedings.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
June 27, 1961.

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